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ARKANSAS SECURITIES DEPT.

BEFORE THE ARKANSAS SECURITIES COMMISSIONER
Case No. S-12-0015
Order No. S-12-0015-13-OR02

IN THE MATTER OF
VFG, LLC f/k/a
VOYAGER FINANCIAL GROUP, LLC,
ANDREW GAMBER, KEVIN MCNAY,
ROBERT HENRY, and
JONATHAN SHEETS RESPONDENTS

CEASE AND DESIST ORDER

On April 22, 2013, the Staff of the Arkansas Securities Department ("Staff") filed its Request for a Cease and Desist Order ("Request"). In its Request, the Staff states that it has received information and has in its possession certain evidence which indicates that VFG, LLC f/k/a Voyager Financial Group, LLC ("VFG") , Andrew Gamber ("Gamber"), Kevin McNay ("McNay"), Robert Henry ("Henry") and Jonathan Sheets ("Sheets") (collectively "Respondents") have violated provisions of the Arkansas Securities Act ("Act"), codified at Ark. Code Ann. §§ 23-42-101 through 23-42-509. The Arkansas Securities Commissioner ("Commissioner") has reviewed the Request and based upon the representations made therein finds that:

FINDINGS OF FACTS

The Request contains the following representation of fact:

1. VFG is a Delaware limited liability company ("LLC") registered to do business in Arkansas with its principal place of business located at 801 Technology Drive, Suite F, Little Rock, Arkansas 72223.
2. Gamber is currently the managing member of VFG, owning 100% of the company as of

February 20, 2013. At all times referenced herein, Gamber held at least a 32% interest in VFG. Gamber has been the managing member since February 28, 2012.

3. From on or about May 21, 2010, to on or about February 28, 2012, McNay owned at least a 32% interest and up to a 47.06% interest in VFG.

4. From on or about May 21, 2010, to on or about August 31, 2011, Henry owned at least a 32% interest in VFG.

5. Upon information and belief, Sheets was the managing member of VFG from September 19, 2011, until some point in 2012, and owned from 4% to 18% interests in VFG from 2011 to June 2012.

6. An individual who wants to sell his or her income stream ("seller") appoints VFG as an authorized "buying agent" to submit a contingent offer to a third-party buyer ("buyer").

7. VFG facilitates transactions between buyers and sellers of income streams derived from assets that have fixed payment amounts and terms, such as retirement or military pension streams.

8. VFG is contacted by potential sellers. VFG vets potential sellers to verify their pension stream is the type of product VFG sells. VFG determines the present value of the income streams and sells the streams to interested buyers through agents VFG labels as independent contractors.

9. VFG submits an offer sheet to the buyer through one of its agents. The purchase price is payable to VFG. VFG assists sellers through the process of selling their income stream. They provide a checklist to the seller of everything necessary to facilitate the sale. If information is incomplete, VFG works with the seller to gather all required information.

One of the items required by VFG is a credit report from the seller to verify that there are no liens on the income stream. VFG also requires verification from the seller's pension company verifying that the seller is entitled to receive a pension, as well as the terms of the pension disbursement including the monthly amount of the income stream.

10. VFG provides the potential buyer with a "closing book" comprised of all the information gathered from the seller regarding the income stream. As represented by VFG, the information contained therein is "all of the information that the [b]uyer needs to make an informed decision on whether to follow through with the purchase." The buyer and seller do not directly communicate during this process. All information and contracts are provided by VFG. All paperwork bears the VFG logo. Furthermore, counsel for VFG encouraged an agent to complete most of the paperwork so buyers only were required to sign the paperwork.

11. If a buyer wants to purchase the income stream, VFG provides the buyer with a purchase application, and VFG accepts the offer to purchase on behalf of the seller. If the buyer backs out of the deal, VFG places the income stream back into an active inventory to be sold. VFG keeps track of and updates inventory lists to forward to agents to sell to buyers.

12. Once an income stream is purchased, the buyer then forwards the purchase-price amount to VFG which sets up an escrow account to hold that amount and make certain distributions and payments.

13. The buyer does not acquire title or ownership of the underlying asset that provides the income stream but acquires a contractual right to receive the income stream from the

annuity or pension.

14. Once the seller assigns the right to receive the income stream to the buyer, the seller creates an escrow account in his or her name and control. The seller grants the escrow company a special, durable power of attorney enabling the escrow company to manage that account and the income-stream funds received. VFG works with the buyer to instruct the escrow company to direct payments of a monthly amount to the buyer for the term agreed upon at the time of sale.

15. The buyer has the option for VFG to facilitate payments of premiums for a life insurance policy on the seller of the income stream because the income streams are life contingent. Further, the buyer has the option to purchase a two-year contestability wrapper through VFG. VFG then coordinates the purchase of the life insurance policies and collateral assignments of pre-existing life insurance policies.

16. Because the buyer does not acquire title or ownership of the underlying asset that provides the income stream, a seller can redirect the stream back to the seller at any time, leaving the buyer with only a legal claim. VFG monitors the investment to assist the buyer if needed and offers its services in identifying why the buyer is no longer receiving the income-stream payments. As part of this service, VFG offers to advance one-month's payment under the income-stream-purchase contract until the issue can be resolved. If the issue cannot be resolved within the one-month timeframe, VFG offers to provide other options to the buyer at that time. For at least one buyer who was no longer receiving income-stream payments, VFG offered to make payments for up to six months while attempting to locate the seller. Through a promissory note with the same rate of

interest as the income stream, VFG offered the option to purchase the income stream back from this buyer at any point during the six months for the original purchase price less the income received by the buyer. For other buyers, VFG offers the services of Buttonwood Insurance Services and Upstate Law Group to attempt remediation.

17. VFG drafts all of the required paperwork and facilitates the execution of the contracts and agreements by involved parties. Additionally, VFG receives a percentage commission from all sales at closing.

18. The agents sign an agreement with VFG ("Agreement") to use their best efforts to recruit, promote, sell, and market products and services offered by VFG. Some agents are given a website to use to promote the product and obtain interested buyers ("website"). According to the Agreement, VFG provides website support and pays fees associated with website development during a preliminary period, which is reimbursed out of the agent's commission fee. Once website fees are reimbursed to VFG and after the preliminary period, the agent will begin to receive a full-percentage commission based upon 90% of the total profit from the sales of the income streams.

19. Pursuant to the Agreement, VFG requires the agents to quote a minimum of fifteen cases per week and average about five purchases a week to justify use of the website. Further, agents are required to drive traffic to the website with "organic links." The agreement further states that agents are given a period of six weeks to reach the quoting-average and purchase-average requirements. The averages are calculated on a six-week basis and subject to a review. The website remains the property of VFG, and VFG retains the right to revoke permission or access to the website being used by agents for any reason.

20. As of August 20, 2012, VFG had facilitated approximately 317 sales in 31 states for an estimated total of $34,245,351.48 and received an estimated $6,724,049.71 in commissions. VFG paid additional commissions to an estimated eighty-one agents between February 2011 and July 2012. Multiple sales were made to two Arkansas residents during that time. Upon information and belief, VFG currently is facilitating sales and collecting commissions from transactions across the country.

21. A search of the records of the Arkansas Securities Department ("Department") shows that VFG has never registered or filed a proof of exemption in accordance with the Act and has never notice filed in accordance with federal law in connection with a covered security for offers and sales of securities in Arkansas.

CONCLUSIONS OF LAW

22. Ark. Code Ann. § 23-42-102(15)(A)(xi) defines investment contracts as securities. The Act was promulgated to protect investors, and it utilizes a broad definition of securities to determine which transactions are subject to the Act. *Carder v. Burrow*, 940 S.W.2d 429, 431 (Ark. 1997) (citing *Schultz v. Rector-Phillips-Morse, Inc.*, 552 S.W.2d 4, 8 (Ark. 1977)). In *Schultz*, the Court held that the definition of a security under the Act should not be given a narrow construction but that "it is better to determine in each instance from a review of all the facts, whether an investment scheme or plan constitutes an investment contract… within the scope of the statute." 552 S.W.2d at 10.

23. Arkansas recognizes transactions as investment contracts if they meet the five-prong risk capital test set out in *Smith v. State,* 587 S.W.2d 50 (Ark. Ct. App. 1979). The five elements of the risk capital test are "(1) the investment of money or money's worth; (2)

investment in a venture; (3) the expectation of some benefit to the investor as a result of the investment; (4) contribution towards the risk capital of the venture; and (5) the absence of direct control over the investment or policy decisions concerning the venture." *Id.* at 52. Furthermore, the United States Supreme Court has defined an investment contract as a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party…." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946).

24. In *Grand Prairie Sav. and Loan Ass'n, Stuttgart v. Worthen Bank and Trust Co., N.A.*, 769 S.W.2d 20, 22 (Ark. 1989), the Arkansas Supreme Court noted that the *Smith* test is substantially the same test used in the federal courts and cited *Union Nat'l Bank v. Farmers Bank*, 786 F.2d 881 (8th Cir. 1986), involving two Arkansas banks and applying the *Howey* test in its analysis. However, as highlighted in *Schultz*, the Court rejected an express adoption of this federal test in favor of a more flexible case-by-case analysis, 552 S.W.2d at 10.

25. The *Smith* risk capital test requires an investment in a venture, whereas the *Howey* test requires an investment in a common enterprise. A venture is defined as an "undertaking that involves risk[.]" *Black's Law Dictionary* 1695 (9th ed. 2009). Under the risk capital test, the term venture is used in the ordinary sense of an "undertaking" and there need only be one investor for a security with no requirement for a venture to include multiple pooled investors. Frances S. Fendler, *Private Placements and Limited Offerings of Securities A Guide for the Arkansas Practioner* § 3.2[2][B] (2010) (*citing* Joseph C. Long, *An Attempt to Return "Investment Contracts" to the Mainstream of Securities*

Regulation, 24 OKLA. L. REV. 135, § 2:86.4 (1971)). The subject transactions satisfy an investment in a venture. Buyers undertake the risk of not receiving income-stream payments when purchasing an income stream. Buyers who purchase the income-stream products pay money to receive a fixed return for a period of time. The buyers purchase the income streams for a certain sum of money as determined by VFG. Therefore, the buyers invest money in a venture with an expectation of the benefit of a fixed return with the risk of the seller redirecting the income stream.

26. In 1997 in *Carder v. Burrow*, the Arkansas Supreme Court applied the risk capital test, and focused on the element requiring the "expectation of some benefit" to analyze whether an instrument was a security. *Carder*, 940 S.W.2d at 431. The *Carder* Court cited the Eighth Circuit case of *First Fin. Fed. Sav. & Loan Ass'n. v. E. F. Hutton Mortgage Corp.*, 834 F.2d 685 (8th Cir. 1987), which analyzed Arkansas law and stated that an expectation of benefit as contemplated by *Smith v. State* is not met by a fixed rate of interest because there was no "opportunity for either capital appreciation or participation" in the company's profits. *Id.* at 689. However, the United States Supreme Court ruled in *SEC v. Edwards*, 540 U.S. 389 (2004), that investment schemes offering contractual entitlement to a fixed rate of return could be investment contracts. *Id.* at 394. The Court further stated that investments "pitched as low-risk (such as those offering a 'guaranteed' fixed return) are particularly attractive to individuals more vulnerable to investment fraud…." *Id.* at 394 (citing 2 S.Rep. No. 102-261, App., p. 326 (1992) (Staff Summary of Federal Trade Commission Activities Affecting Older Consumers)). Additionally, the Court stated that there was no reason to distinguish between promises of

variable returns and promises of fixed returns. *Edwards*, 540 U.S. at 394. Therefore, the requirement of an expectation of some benefit is satisfied because buyers expect to receive a fixed return upon purchasing an income stream.

27. As required by the *Smith* risk capital test, the buyers contribute to the risk capital of the venture by paying money to receive the income-stream payments that are reassigned from the original owner and seller to the buyer for a period of time. The purchase price is then redistributed to the agents and VFG to pay commissions, with the remaining balance going to the seller. The full amount of the purchase price is not forwarded directly to the seller. Money is first paid in the form of commissions to VFG and its agents before a lesser amount is forwarded to the seller. The buyer is then at risk of the income streams being improperly redirected to the seller without the intervention of VFG to make sure everything functions as it should.

28. Additionally, the final requirement of *Smith* is satisfied, as there is an absence of direct control over the investment as well as an absence of control over policy decisions concerning the venture. VFG connects the buyers and sellers who would not otherwise transact business, if not for VFG's coordination and involvement in the venture. Although a contract dictates that the income stream is assigned to the buyer, the buyer has no actual control over the income stream. If the income stream is redirected and the buyer is no longer receiving the income, VFG steps in, contacts the seller to determine the problem, and tries to remedy the problem for the buyer. VFG reaches out to the seller and relays information back to the buyer. One buyer stated that there was never direct involvement with the seller throughout the income-stream transaction. VFG and its

agents facilitated all contact and transactions. In addition, all paperwork between the buyer and seller is on VFG letterhead and is reviewed by VFG. VFG vets the seller and verifies that the information provided by the seller is correct. VFG verifies that there is actually a pension income stream and receives a credit report from the seller to ensure there are no liens on the income stream. Additionally, VFG determines the value of the income stream. Examining the totality of VFG's responsibilities and efforts, the return generated to the buyer depends on VFG's managerial skills in conducting pre-closing investigations and analyses, verifying all information is in place, verifying that there is a life insurance policy either purchased or collaterally assigned in case of the death of the seller, and providing all necessary paperwork to the buyers and sellers to facilitate the transaction.

29. Considering the totality of the program offered by Respondents, the transactions described herein are investment contracts pursuant to the risk capital test. As Ark. Code Ann. § 23-42-102(15)(A)(xi) defines investment contracts as securities, the transactions described herein are securities.

30. VFG would be considered a person pursuant to the Act as Ark. Code Ann. § 23-42-102(11) defines person as an individual or a LLC among other things.

31. Rule 102.01(11)(A) and (B) of the Rules of the Arkansas Securities Commissioner ("Rules") presumes control of a person when any individual is a director, partner or officer exercising executive responsibility or has a similar status or performs similar functions or directly or indirectly has the right to vote 25% or more of the voting securities of a person. Gamber, McNay, Henry, and Sheets would be considered to be in

control of VFG. Gamber is the managing member of VFG and currently owns 100% of VFG and has owned at least a 32% interest in VFG during all times referenced herein. From May 21, 2010, to February 28, 2012, McNay owned at least a 32% interest and up to a 47.06% interest during that time. Henry owned at least a 32% interest in VFG from May 21, 2010, to August 31, 2011. Sheets represented that he was the managing member of VFG from September 19, 2011, until Gamber became managing member at some point in 2012.

32. Ark. Code Ann. § 23-42-501 provides that it is unlawful for any person to offer or sell any security in this state which is not registered or which is not exempt from registration under the terms of the Act.

33. Pursuant to Ark. Code Ann. § 23-42-103(a)(3), an offer to sell or to buy is made in this state when the offer originates from this state.

34. The facts set out above in paragraphs two through twenty-one illustrate that the Respondents offered and sold unregistered securities in violation of Ark. Code Ann. § 23-42-501.

35. Ark. Code Ann. § 23-42-209(a)(1)(A) provides that whenever it appears to the Commissioner upon sufficient grounds or evidence satisfactory to the Commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of the Act, the Commissioner may summarily order the person to cease and desist from the act or practice. Respondents have engaged in conduct that violates the Act. Based upon the seriousness of the violations and the remedial function to be served by this Cease and Desist Order, this Cease and Desist Order is in the public

interest and appropriate.

36. The seriousness of the violations described above should not be taken lightly as violations of Ark. Code Ann. § 23-42-501 can give rise to civil liability under Ark. Code Ann. § 23-42-106.

37. The Commissioner is empowered by Ark. Code Ann. § 23-42-205(a) to make any public or private investigations within or outside of Arkansas which he deems necessary to determine whether any person has violated or is about to violate any provision of the Act or any rule or order issued or promulgated under the Act or to aid in the enforcement of the Act. Based upon the representations made by the Staff in its Request, it is appropriate that the Staff continue its investigation into Respondents to determine if other violations of the Act and Rules have occurred.

ORDER

IT IS THERFORE ORDERED that VFG, LLC f/k/a Voyager Financial Group, LLC, Andrew Gamber, Kevin McNay, Robert Henry, and Jonathan Sheets, immediately cease and desist from any further actions in Arkansas in connection with the offer or sale of securities and any other violation of the Act or Rules.

The Staff shall continue its investigation to determine what, if any, other violations of the Act or Rules have occurred. This investigation should include the total amount and type of securities offered and sold by or through the agency of any of the Respondents or any associated or affiliated entities or persons as yet unknown, the methods used and representations made in connection with the offer and sale of securities and the disposition of any funds invested.

A hearing on this Order shall be held if requested by any party in writing within thirty

days of the date of entry of this Order, or if otherwise ordered by the Commissioner. Such request should be addressed to the Commissioner and submitted to the following address:

Arkansas Securities Commissioner
201 East Markham, Suite 300
Little Rock, Arkansas 72201

If no hearing is requested and none ordered by the Commissioner, this Order will remain in effect until it is modified or vacated by the Commissioner pursuant to Ark. Code Ann. § 23-42-209(a)(2)(B).

IT IS SO ORDERED.

A. Heath Abshure
Arkansas Securities Commissioner

April 22, 2013
Date